Editor's note: Reconsideration granted; decision vacated -- See Evan Chiskok (On Reconsideration), by the decision at 61 IBLA 1 (Dec. 28, 1981)

EVAN CHISKAK, ALEX HUNT
ANGELA ODINZOFF, ANTONIA RAYMOND

IBLA 75-77A Decided September 30, 1975

Appeals from decisions rejecting Alaska Native allotment applications F-16236, 16375, 16386 and 16398.

Affirmed.

1. Alaska: Native Allotments

Lands required for airport approach and aviation purposes, and lands most used in common by the general community, will be retained in public ownership and will not be conveyed pursuant to an application filed under the Alaska Native Allotment Act. Where the record fails to show that a Native has used land at least potentially to the exclusion of others for a 5-year period, his application for Native allotment is properly rejected.

APPEARANCES: Scott Evans, Esq., of Alaska Legal Services Corp., for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The above-named appellants filed applications under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970). Each recited that the land applied for was used for fishing, hunting, and berry-picking; each stated that no permanent improvements had been erected. Premised upon reports of field examinations, the Alaska State Office, Bureau of Land Management (BLM), rejected the applications by separate decisions because the parties had each failed to comply with 43 CFR 2561.0-5(a) requiring that "Such use and occupancy must be substantial actual possession of the land, at least potentially exclusive of others, and not merely intermittent use."

The field examiners engaged local Native guides, who were designated by the Village Council of St. Michaels, before conducting examinations in the several cases. The guides knew the applicants, the lands applied for, the customs and habits of the local people. The parcels involved were identified, and "extensively" examined both from the air and on the ground. The field examiners reported that the areas covered by the applications were well used by the local population for fishing, hunting and other purposes. Many of the parcels had well identified trails crossing them. The reports also noted that much of the land in these applications is flood plain, subject to flooding and ice damage from Norton Sound. However, with reference to the claim of Evan Chiskak, F-16236, the only evidence of occupancy or use by anyone found by the field examiner was a recently vacated tent site, which was identified by the local guide as the camp of persons other than the claimant. No evidence whatever was found of any sort of use by Chiskak. A portion of the land in the Odinzoff application, F-16386, is in the direct approach lane of the Stebbins airport (lease application F-13819). The Raymond application, F-16398, included land occupied by an empty, old, weather-beaten, frame structure which is utilized by the public as a storm shelter. Raymond does not assert ownership of that structure.

Public use and safety require approach lanes at public airports be kept clear for aviation purposes. Therefore, pursuant to the discretionary authority of the Act, it is correct and proper for the Secretary to exercise his discretion to the end that such land be retained in public ownership. See Pence v. Morton, Civ. No. A 74-138 (D. Alaska, filed April 8, 1975). 1/

The field examiners' reports support appellants' statements. None of the lands applied for boast any permanent improvements except for the apparently abandoned building described above. Other than as noted on the Chiskak claim, the separate tracts carried no evidence of campsites, the lands being sufficiently close to the Village of St. Michaels for the applicants to return to their homes after day use. Evidence of possible temporary campsites was washed away by the waters of Norton Sound. The field examiners concur with appellants' statements that the lands are not used exclusively by appellants; they portray a picture of lands which are suitable and used, but not exclusively, for berry-picking, hunting and fishing. The geographical location of the several parcels in relation to the Village, the recognized values of the lands, the well-used foot-paths and the old building which serves as a public shelter, when viewed together, impel the conclusion that the lands applied for are more in the nature of a "commons," i.e., common-use or community use areas. Such use is

1/ Appeal pending.

inconsistent with a personal claim of possession "at least potentially to the exclusion of others" for a 5-year period. Under such circumstances the applications must be rejected. Gregory Anelon, Sr., 21 IBLA 230 (1975). Cf. John Nanalook, 17 IBLA 353 (1974).

Therefore pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decisions appealed from are affirmed.

Edward W. Stuebing
Administrative Judge

FREDERICK FISHMAN, ADMINISTRATIVE JUDGE, CONCURRING:

I agree with the main opinion but wish to point out another basis for its conclusion. I note that the Native Allotment application of Angela M. Odinzoff, F-166386, embraces land which is subject to flooding and ice damage from Norton Sound as shown by the report of field examination. This flooding hazard is also true of the applications F-16398 of Antonia Raymond, F-16236 of Evan A. Chisak, and F-16375 of Aleck Hunt, Sr.

Executive Order 11296 of August 10, 1966, 3 CFR 571-573 provides in part that:

> (3) All executive agencies responsible for the disposal of Federal lands or properties shall evaluate flood hazards in connection with lands or properties proposed for disposal to non-Federal public instrumentalities or private interests and, as may be desirable in order to minimize future Federal expenditures for flood protection and flood disaster relief and as far as practicable, shall attach appropriate restrictions with respect to uses of the lands or properties by the purchaser and his successors and may withhold such lands or properties from disposal. In carrying out this paragraph, each executive agency may make appropriate allowance for any estimated loss in disposal documents. (Emphasis supplied.)

The Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), provides that the "Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe to allot not to exceed one hundred and sixty acres * * * to any Indian, Aleut, or Eskimo * * *." (Emphasis supplied.)

Thus it is crystal clear that the allowance of Native allotment applications is an exercise of discretion. In the exercise of that discretion it is proper, as shown by Executive Order 11296, to withhold from disposal lands subject to flooding. See Verlin C. Stephens, A-26721 (July 3, 1953).

Moreover, appellants' showings of use and occupancy are weak and not convincing.

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING IN PART AND DISSENTING IN PART:

As to the application of Alex Hunt (F-16375), Angela Odinzoff (F-16386) and Antonia Raymond (F-16398), I concur with the result reached in the majority decision. I feel that appellants have not submitted sufficient proof of their entitlement to the allotments.

This dissent relates to the appeal of Evan Chiskak, F-16236. The appellant has set forth a prima facie case as to his entitlement to parcel B in section 4 and parcel A in section 8, T. 24 S., Rs. 18 and 19 W., Kateel River Mer., and has supported his claims with two additional affidavits submitted with Board permission subsequent to the BLM decision. In this situation I feel that the application should be reconsidered under the guidelines set forth in the October 18, 1973, memorandum of the Assistant Secretary, Land and Water Resources to the Director, Bureau of Land Management, and Assistant Secretary Hughes' letter of July 30, 1974, to the President, Alaska Federation of Natives, Inc. The first paragraph of the guidelines states in part:

> To the extent these conclusions serve as assistance in the adjudication of the pending applications, they supersede any previous interpretational guidelines issued by this office. These conclusions relate only to Native Allotment applications pending before the Department on December 18, 1971.
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> Secretary Hughes' letter confirms the following commitments:
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> 1. * * *
> The applicant, the appropriate village council, and the appropriate regional corporation will be notified 30 days in advance of planned field examinations. This notification will request the applicant or his designee to be present and accompany the BLM field examiner. If neither of them are available, the village council or corporation will be asked to designate a representative to accompany the field examiner.
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> 11. * * *
> In considering evidence of use, sworn statements by witnesses who have firsthand knowledge of the facts will be given substantial weight on the matters to which they testify. * * *

The record herein is summarized as follows.

First, the decision is based upon a field examination made by a realty specialist with the assistance of a guide, Phillip Abouchuk "who was knowledgeable of the use in the St. Michael area." The guide has since signed an affidavit supporting the claims of appellant, Chiskak. That affidavit states that the applicant used the land for hunting, berry picking, and fishing beginning "at least 10 years ago, probably more." The affidavit further states that "friends from the Village" also used the land "with [applicant's] knowledge and approval in the traditional way." This type of statement from the guide selected by the Department is sufficient in itself to cause the case to be remanded for additional evidence. Similar statements were filed by applicant and his wife. No contradictory affidavits were filed.

Second, the only use by others is that of (a) friends and relatives with applicant's approval and (b) people from Stebbins (a different village from that of the applicant) who "recently camped" on the parcel B. Except for use of the Big St. Michael canal, no other use whatsoever has been alleged or proved, nor is there any indication whether the use by the Stebbins villagers was more than a short one-time use. Mr. Abouchuk told the field examiner about the campsite having been made by Stebbins villagers, but he did not mention such use in the affidavit filed with this appeal. It is unclear which other portions of the field report should be attributed to information from Mr. Abouchuk.

Third, the applicant was not contacted by the field examiner, and no reason therefor appears in the record. Since large areas were involved, which are subject to flooding, it is not surprising that a field examination -- conducted without the assistance of appellant -- did not disclose evidence of his hunting, berry picking, and fishing. The field examination states: "An extensive aerial search for evidence of use and occupancy was conducted by helicopter, and on-the-ground investigation." The word "extensive" would seem to apply to the aerial search.

Judge Fishman points out that the Secretary is "authorized and empowered, in his discretion" to allot the land, and that under Executive Order 11296, supra, after evaluating the flood hazard the Department "may withhold such lands or properties from disposal." For this reason he would affirm the decision below. However, it may be the Department has a policy of granting floodlands under the Allotment Act if the flood lands are appropriate for Native hunting, fishing and berry picking and not particularly appropriate for other purposes. The record does not show that there has been an evaluation of that portion of the Executive Order which provides for a determination of whether it "may be desirable in

order to minimize future Federal expenditures for flood protection and flood disaster relief" to attach "appropriate restrictions with respect to uses of the land or properties by the purchaser and his successors" or to "withhold such lands * * * from disposal." I do not feel that the Board should make the initial determination as to such matters, and the necessary information as to Department policies and practices is not present in the record.

I would remand the Chiskak application so that the Assistant Secretary's guidelines, supra, may be applied and the record completed. The following guideline, supra, at 4, should be especially helpful in resolution of the questions in this case:

> Native Community Use
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> * * * The determination of whether an individual applicant's use was exclusive is a factual one which should be answered by soliciting affidavits and testimony from village inhabitants and others with knowledge of the situation.

Joseph W. Goss
Administrative Judge